132-357

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~310~~. 49

THE HASTINGS AND DAKOTA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JULIA D. WHITNEY AND JOHN WHITNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED AUGUST 6, 1886.

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STATE OF MINNESOTA, } ss:
County of Ramsey, }

I hereby certify and return that, after due and diligent search, I have been unable to find the within-named defendant-, Julia D. Whitney and John Whitney, or either of them within my said county, and the defendant- aforesaid cannot be found within said Ramsey county.

Dated this 5th day of September, 1884.

HENRY O. GORMAN,
Sheriff of Ramsey County, Minn.

Sheriff's fee, return, $0.60.

Summons for Relief.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, 2nd Judicial District.

THE HASTINGS AND DAKOTA RAILWAY COMPANY
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

The State of Minnesota to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which is on file in the office of the clerk of the said court, at his office, at Saint Paul,
2 Minnesota, and to serve a copy of your answer to said complaint on the subscribers, at their office, in the city of St. Paul, in the said county of Ramsey, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated September 4th, A. D. 1884.

COLE & BRAMHALL,
Plaintiff's Attorney-, St. Paul, Minn.

(Endorsed:) Summons. Demand for relief. Filed Sept. 5th, 1884. Cole & Bramhall, plaintiff's att'ys. R. W. Bell, clerk.

STATE OF MINNESOTA, *County of Ramsey:*

District Court, 2nd Judicial District.

THE HASTINGS AND DAKOTA RAILWAY COMPANY
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

The complaint of the plaintiff respectfully shows to the court that it is a corporation duly organized, incorporated, and existing

under the laws of the State of Minnesota, to wit: That said
3 corporation was duly incorporated in and by an act of the Legislature of the Territory of Minnesota entitled "An act to incorporate the Hastings, Minnesota River and Red River of the North Railroad Company," approved February 20th, 1857, and the act of the Legislature of the State of Minnesota amendatory thereof, entitled "An act to amend an act entitled An act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved February 20th, 1857," approved March 3rd, 1866, and the several acts of the Legislature of said State amendatory thereto; that in and by "An act entitled An act to amend an act entitled An act to amend an act entitled An act to incorporate the Hastings, Minnesota River and Red River Railroad Company," approved February 26th, 1857, and approved March 3rd, 1866, and approved March 9th, 1867, said company was authorized to change its name by resolution of its board of directors, and that said company did thereafter, by resolution in all respects in conformity with said act, change its name to the name of the plaintiff in this action,
4 as designated in the title to this complaint; that said corporation was in and by said acts authorized and empowered to survey, locate, complete, and operate a railroad from a point in Hastings, in the county of Dakota, in the State of Minnesota, therein designated, by the most feasible and practicable route towards Glencoe, in McLeod county, and in the direction of Red Wood Falls, in Red Wood county, on the Minnesota river, as shall be deemed most expedient by said company; thence westwardly to the western boundary of the State of Minnesota, through Red Wood county, in the direction of the junction of the Big Cheyenne river with the Minnesota river, with power to build a branch road diverging from any point on the main trunk road to the Red River of the North, near the head of that river, at such point as such company may deem most expedient.

That in and by an act of the Congress of the United States entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State," approved on the fourth day of July, 1866, the Congress of the United States granted to the State of Minnesota, for
5 the purpose of aiding in the construction of a railroad from Hastings through the counties of Dakota, Scott, Carver, and McLeod to such point on the western boundary of the State as the Legislature of the State may determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it should appear that the United States have, when the line or route of said road is definitely located, sold any section or part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections

or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated or to which the rights of homestead or pre-emption
6 settlement has attached as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Minnesota for the purposes and uses aforesaid, provided that the land so selected shall in no case be located more than twenty miles from the line of said road, and provided that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever are excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, provided the United States has yet in possession the title thereto.

That the Legislature of the State of Minnesota, in and by an act entitled "An act to accept the grant and in execution of the trust made and created in and by an act of Congress entitled
7 'An act making an additional grant of the lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State, approved July 4th, 1866, approved March 7th, 1867," duly accepted said grant and duly granted and transferred the same to the plaintiff; that the plaintiff, in conformity to all the provisions of any act of Congress or of the State of Minnesota and within the time therein limited and prior to the commencement of this action, built and completed the said railroad, and in all things complied with said acts and with the terms of an act of the Legislature of the State of Minnesota entitled "An act to extend to the Hastings and Dakota Railway Company further time for the completion of a certain portion of its railway," approved March 4th, 1869, and of an act entitled "An act to further extend the time for the completion of a certain portion of the Hastings and Dakota railway and to amend a certain act relating thereto," approved March 2nd, 1871, and with the terms of all the
8 provisions of any and every act of the Congress of the United States or of the State of Minnesota relating thereto, and earned and became entitled to all of the lands included within the terms of said grant and caused said railroad within and through the counties named in said acts and upon the line therein designated to be definitely located and staked out upon the ground, and maps thereof to be filed, as required by law, along its whole route and opposite the land hereinafter described, prior to May seventh, 1877, and on or about the seventh day of March, 1867.

And plaintiff further shows that the following-described land, to wit, the south half of the southwest quarter of section No. thirty-five, in township No. one hundred and sixteen, range No. thirty-two, was embraced within said grant and within what are known as the ten-mile limits thereof, and when the line of said railroad was definitely located no right of pre-emption or homestead settle-
9 ment had attached thereto and the same had not been

reserved by the United States for any purpose whatever, nor had the United States sold said land, but the same duly passed to the State and through the State to the plaintiff by virtue of the facts hereinbefore set forth, and plaintiff became entitled to such muniments of title as were necessary and usual to vest the legal paper title in it. The plaintiff further shows that, claiming under the provisions of section twenty-two hundred and ninety-three of the Revised Statutes of the United States, which provides that in case any person desires to avail himself of the chapter of which that section constitutes a part, being the chapter entitled "Homesteads," but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding section of said chapter require-, whose family or some member thereof is residing on the land which he desires to enter and upon which a *bona fide*
10 settlement and improvement has been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in the law and with like penalties as if taken before the register and receiver, and upon such affidavit being filed with the register by the wife or other representative of the party the same shall become effective from the date of such filing, provided the affidavit and application are accompanied by the fees and commissions required by law, one Bentley S. Turner, on the eighth day of May, 1865, he then being a soldier in the army of the United States and actually with his *requirement* in the State of Virginia, made an affidavit and caused the same to be filed in the local land office in Minnesota of the district wherein said land was situated purporting to be under said section. This affidavit was
11 made before his commanding officer in the State of Virginia, while in the military service of the United States, and alleged that he, said Turner, was the head of a family, a citizen of the United States, and a resident of Franklin county, New York. The application was made through one Onwell, the chaplain of the regiment, whom said Turner constituted his attorney for that purpose, on this affidavit, to enter the hereinbefore-described tract of land as a homestead for and on behalf of said Turner. The said affidavit did not show or state that the affiant's family or any member thereof was residing on the land sought to be entered or that there was any improvement, *bona fide* or otherwise, thereon, and, as a matter of fact, no member of his family or any one for him or them, and in fact no improvements had ever been made thereon by any one; that thereupon, being paid their fees by said Onwell, the said register and receiver of said land office did, wrongfully and without authority and in excess of their jurisdiction in the premises, allow said entry, and the same stood upon the records of said
12 land office uncancelled at the date of said grant by Congress to the State for and in aid of plaintiff's railroad and at the date of the definite location thereof.

And plaintiff further alleges that long after said route of plaintiff's

road had been definitely located and its rights had definitely attached to said land the said entry was formally cancelled of record because of the want of residence and improvement as aforesaid, and thereafter and on the seventh day of May, 1877, without notice to this plaintiff, and without any authority or jurisdiction in them, the defendant, Julia D. Whitney, then a single woman, by name Julia D. Graham, was permitted by the register and receiver of said land office to enter said premises as a homestead, and thereafter and in the usual course of business at the General Land Office of the United States the officer in charge of said Department, wrongfully and without authority of law and in excess of his jurisdiction in the premises, did cause the patent of the United States for the said land to be issued in due form and delivered to said
13 defendant, who is in the actual occupancy and possession of said premises by her tenant, holding and claiming to hold the same under the said patent and title from the United States so wrongfully and without authority issued to her as aforesaid; that after the entry of said land the said defendant intermarried with the other defendant, who is now her lawful husband; that said land is of the value of six hundred dollars; that the only ground upon which said patent was issued was and is the homestead entry aforesaid based on said affidavit, and because that said affidavit did not state or show that there was any one in possession of the land aforesaid, either a member of said Turners' family or otherwise, or that the same had ever been improved on behalf of said Turner or otherwise, and because the fact was that the said land was vacant public land of the United States at the time of said pretended entry by said Turner, without improvement or cultivation, and continued to be so down to and after and
14 at the time that plaintiff's rights attached under the grants from the United States and State, hereinbefore set out, the plaintiff claims that said patent should be set aside and cancelled, and that the right to said land and to have the legal muniments of title therefore vested in the said plaintiff; alleges that there never was a valid homestead entry of said land prior to the time that its rights attached as aforesaid.

Wherefore the plaintiff prays the decree and judgment of this court declaring the equity of the plaintiff in and to said land and adjudging the pretended title of said defendant to be void, and enjoining both of the defendants from the assertion of any claim or title to said land under said patent, or that the title to said land be vested in the plaintiff by the order and judgment of this court, or that the plaintiff do have and recover the possession thereof from said defendants, or for such other or further relief as may be just and equitable, together with the costs and disbursements of this action.

COLE & BRAMHALL,
Pl'ff's Att'ys, St. Paul, Minn.

15 STATE OF MINNESOTA, } ss:
County of Ramsey, }

George E. Skinner, being first duly sworn, on his oath says that he is the agent and land commissioner of the plaintiff in the above-entitled cause and the only one of its officers within this State; that he has read the foregoing complaint and knows the contents thereof; that the same is true except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

GEO. E. SKINNER.

Subscribed and sworn to before me this 3rd day of September, 1884.

[L. S.] WM. ELY BRAMHALL,
Notary Public, Minn.

Filed Sept. 4, 1884.

R. W. BALL, *Clerk.*

Endorsed: State of Minnesota, county of Ramsey, district court. Hastings & Dakota Railway Co. *vs.* Julia D. Whitney *et al.*
16 Compl't. Summonds served 18 Oct., '81. Cole & Bramhall, pl'ff's att'ys, St. Paul, Min.

STATE OF MINNESOTA:

District Court for the County of Ramsey.

THE HASTINGS AND DAKOTA RAILWAY COMPANY
against
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

And now here comes the said defendants, by their attorney, M. O. Little, and, for answer to the complaint herein, deny each and every allegation therein contained except the allegations hereinafter expressly admitted.

The defendants admit the allegations in folios one to thirteen, inclusive, in the said complaint, and also folios sixteen to twenty. Defendants deny that the register and receiver of the land office or either of them, wrongfully or without authority or in excess of their jurisdiction in the premises, allowed said entry of the said Turner mentioned in the complaint; but, on the contrary, the defendants aver, upon their information and belief, that the said entry
17 was duly and lawfully allowed by the proper officers of the United States and the entry by him duly made and allowed in favor of the said Turner by the register and receiver of the proper United States land office and the officers of the General Land Department of the said Government, and that the said entry stood upon the records of the said local land office and upon the records of the General Land Office in full force and uncancelled at the date of the act of Congress mentioned in the complaint and re-

mained in full force and *uncalled* upon the said records and by any of the officers or departments of the United States until September 30, 1872, when the said entry was duly cancelled for failure of the said Turner to make final proof and not for the reason or because of the want of residence or improvement thereon.

Defendants admit that the defendant was on the seventh of May, 1877, unmarried, and that her name was Julia D. Graham, and that on that day and under her said maiden name she made a homestead entry upon the said land in the complaint mentioned, and thereafter lived, resided upon, and improved the same up to and until the issuing of the patent therefor by the United States, as stated in the complaint.

The defendants admit that they are husband and wife, as alleged in the complaint.

18 The defendants, further answering the said complaint, aver that the homestead entry of the said Turner was duly allowed and entered at the proper land office of the district in which the said land was situated at the time in the complaint mentioned and still remained uncancelled and never was declared cancelled or forfeited by the United States or any officer or department thereof until long after the time the grant of lands to the plaintiff took effect, to wit, until September 30, 1872.

That by reason of the said entry, filing, and allowance of the said homestead of said Turner upon the land mentioned in the complaint and which was in full force, and the said entry uncancelled and unforfeited at the time the plaintiff's said grant took effect, the said land was segregated from the lands covered by the said grant to the plaintiff and reserved and excepted from the said grant to the plaintiff.

The defendants admit that they are in possession of the said premises, as alleged in the complaint.

Wherefore defendants demand the judgment of this court that the plaintiff take nothing by this action, and that defendants recover their costs and disbursements.

M. O. LITTLE,
Defendants' Attorney.

19 STATE OF MINNESOTA, }
County of Hennepin, } ss:

M. O. Little, being duly sworn, says he is defendants' attorney in the above-entitled action; that the foregoing answer is true, to the best of his knowledge, information, and belief; that the reason defendants do not make this affidavit is that they are absent from and do not reside in the county of Hennepin, in which county affiant resides.

M. O. LITTLE.

Subscribed and sworn to before me this 28 day of Nov., 1884.
[L. S.] A. H. NUNN,
Notary Public.

Endorsed: Filed March 6, 1885. R. W. Bell, clerk.

STATE OF MINNESOTA, *County of Ramsey:*

District Court, 2nd Judicial District.

THE HASTINGS AND DAKOTA RAILWAY COMPANY

vs.

JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

For reply to the answer in this action plaintiff denies that the entry of Turner mentioned in the complaint was duly or legally allowed by the proper officers of the United States or by the register and receiver of the proper or of any United States land office or the officers of the General Land Department of said Government or was duly made by said Turner, and denies any knowledge or information sufficient to form a belief as to for what cause said entry was cancelled, and denies that by reason of said Turner's entry or its filing or allowance the land described in the complaint was segregated from the lands covered by the grant to the plaintiff or reserved or excepted therefrom.

COLE & BRAMHALL,
Pl'ff's Att'ys, St. Paul, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

George E. Skinner, being duly sworn, says that he is the land commissioner of plaintiff corporation and the only officer thereof in the State of Minnesota; that he has heared the foregoing reply read and knows the contents thereof, and that the same is true, to the best of his knowledge, information, and beleif.

GEO. E. SKINNER.

Subscribed and sworn to before me this 29 day of November, 1884.
[L. S.] OWEN MORRIS,
Notary Public, Minn.

Endorsed: Filed March 12, 1885. R. W. Bell, clerk, by G. A. Lienberg, dep'y.

21 STATE OF MINNESOTA, *County of Ramsey:*

District Court.

THE HASTINGS & DAKOTA RAILWAY COMPANY

vs.

JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

This action was tried by the court without a jury. The court finds that the allegations contained in the first thirteen folios of the complaint down to the words "and plaintiff further shows," in the 13th folio, are true.

The land specifically described in the complaint is embraced in

what are known as the ten-mile limits in said grant, and when the line of said railroad was definitely located no right of pre-emption or homestead settlement had attached thereto, and the same had not been reserved by the United States for any purpose whatever, nor had the United States sold said land, save as hereinafter stated.

Claiming to act under the provisions of section 2293 of the Revised Statutes of the United States, one Bentley S. Turner, on the 8th of May, 1865, then being a soldier in the Army of the United States and actually with his regiment in the State of Virginia,
22 made an affidavit and caused the same to be filed in the local land office of the district wherein said land was situate. Said affidavit was made before his commanding officer, in the State of Virginia, and stated that said Turner was the head of a family, a citizen of the United States, and a resident of Franklin county, New York. Application was made through one Conwell, whom said Turner constituted his attorney for that purpose, upon said affidavit to enter said land as a homestead. Said affidavit did not state that Turner's family or any member thereof was residing on the land, or that there was any improvement thereon; and, as a matter of fact, no member of his family was then residing or ever did reside on said land and no improvement whatever had ever been made thereon by any one. Thereupon, upon being paid their fees by said Conwell, the register and receiver of said land office allowed said entry, and the same stood upon the records of said local land office and upon the records of the General Land Office uncancelled until September 30th, 1872, when said entry was cancelled by the proper officers of the United States.

It does not appear that any specific reason was assigned for said cancellation, nor does the reason for said cancellation appear, save as it may be furnished by the facts aforesaid.

23 On the 7th day of May, 1877, without notice to plaintiff the defendant, Julia D. Whitney, then a single woman, by name Julia D. Graham, who has since intermarried with said defendant, John Whitney, did enter said land at the local land office as a homestead, and thereafter, in the usual course of business, the officers in charge of the General Land Office of the United States caused a patent of the United States for said land to be issued in due form and delivered to said defendant Julia, who ever since May 7th, 1877, has been and now is in the actual occupancy of said premises, holding the same under said patent. Said land is of the value of six hundred dollars, $600.

Save as aforesaid, the allegations of the complaint are not true.

As conclusions it is determined that the homestead entry of said Turner was absolutely void; that the said land passed under said grant to said plaintiff; that the entry of said defendant was unauthorized and of no effect, and that the plaintiff is entitled to have the title to said land vested in itself and to recover possession thereof.

Let judgment be entered accordingly, with costs and disbursements.

April 28th, 1885.

HASCAL R. BRILL, *Judge.*

Endorsed: Filed April 28, 1885. R. W. Bell, clerk.

24 STATE OF MINNESOTA, *County of Ramsey:*

District Court.

THE HASTINGS & DAKOTA RAILROAD COMPANY
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

This cause being regularly on the calendar of the above-entitled court for trial at the general term thereof, commencing on the second Tuesday in January, 1885, and coming on regularly to be heard by said court on the 10th day of March, 1885, Gordon E. Cole appearing as attorney for the plaintiff and M. O. Little for defendant, the case was tried, sitting without a jury; whereupon the parties, respectively, introduced their evidence, and, the evidence being closed, the cause was duly submitted to the court for its consideration and decision, and after due deliberation thereon the court delivers its findings and decision in writing, which is on file in this cause in the office of the clerk of said court, and therein orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and of the premises aforesaid, it is ordered and adjudged that the entry by Bentley S. Turner of the S. ½ of the S. W. ¼ of section No. 35, in T. 116, R. 32, as a
25 homestead was absolutely void, and that said described land passed under a grant made by the Congress of the United States in and by an act entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State," approved on the 4th day of July, 1866, to the plaintiff, The Hastings & Dakota Railroad Company; that the entry of Julia D. Graham (defendant, Julia D. Whitney) of said described premises as a homestead was unauthorized and of no effect, and that the title of said land is vested in plaintiff, and that it recover the same of the defendant, Julia D. Whitney, and that plaintiff do have and recover from said defendant the sum of thirty-two and $\frac{45}{100}$ dollars, its costs and disbursements herein.

Judgment entered May 12, 1885.

Signed this 12th day of May, A. D. 1885.

R. W. BELL, *Clerk.*

Endorsed: Filed May 12, 1885. R. W. Bell, clerk.

26 STATE OF MINNESOTA:

In the District Court for the County of Ramsey.

THE HASTINGS AND DAKOTA RAILWAY COMPANY
against
JULIA D. WHITNEY and JOHN WHITNEY.

This cause was duly brought on for trial at a general term of said

court, and was, on the 12th day of March, 1885, tried before the Hon. H. R. Brill, one of the judges of said court, without a jury, where the plaintiff, to maintain the issues on its part, offered in evidence copies of certain papers relating to the entry of the land in controversy, all in one package and hereto attached, marked Exhibit "A."

To which defendant- duly objected on the ground that each and all of said papers were immaterial, incompetent, and the further objection that *that* it is not a complete record and does not contain all the papers or record relating to the entry and cancellation
27 of the Turner homestead, but refers to other papers and records. Said objection was overruled; to which ruling the defendant- duly excepted, and their exceptions were duly noted. Exhibit "A" was received in evidence.

GEORGE E. SKINNER was called, sworn for plaintiff, and testified:

I am now and ever since the organization of the *defendant* have been land commissioner for the Hastings and Dakota Railway Co. The land in controversy is within the ten-mile limits of the land grant. I have made application, prior to the commencement of this action, to the United States authorities, demanding that lists of all these lands embraced within the ten-mile limits should be certified to the company, including the land in controversy. The land in controversy has not been certified to us. Application has been made to the State authorities—the Governor of the State—for deeds for all lands embraced within the limits, including the lands in controversy. The lands in controversy has not been deeded by
28 the State to the company pursuant to those applications.

(It was here admitted that the value of the land was $600.)

Plaintiff rests.

Evidence closed.

After due consideration the court made and filed its findings and decision, in writing, ordering judgment for plaintiff, which is here referred to and made a part of this case.

The foregoing contains all the evidence and, with the pleadings and findings of the judge, all the proceedings had on the trial of the said cause.

The foregoing, having been by me duly examined and found conformable to the truth, is hereby allowed and signed as and for the settled case, which is ordered to be attached to and made a part of the judgment-roll in said cause.

Dated this August 27, 1885.

HASCAL R. BRILL, *Judge.*

EXHIBIT "A."

F C. H. B.

DEPARTMENT OF THE INTERIOR, W. J. D.

29 GENERAL LAND OFFICE, *September* 23, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed papers are copies of papers

on file in this office relating to the homestead entries of Bentley S. Turner and Julia D. Graham, covering the S. W. ¼ of section 35, township 116 N., range 32 W., 5th principal meridian, and the S. ½ S. W. ¼ of said section, in the present Benson (former Minneapolis) land district, in Minnesota, and of the record of the letter of the then Commissioner of the General Land Office ordering a withdrawal of lands in said Minnesota and Red River of the North (now Hastings and Dakota) railroad, and that each is a true and literal exemplification of the original to which it relates.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. General Land Office.]

N. C. McFARLAND,
Commissioner of General Land Office.

30 *Affidavit.*

STATE OF VIRGINIA, *County of Dinwiddie:*

MARCH 8TH, 1865.

I, Bently S. Turner, of Franklin county and State of New York, being now in the military service of the United States and proposing to file my application, No. 1842, for an entry under the provisions of the act of Congress approved March 21, 1864, amendatory of the original homestead act of May 20, 1862, and for other purposes, do solemnly swear that I am the head of a family, over twenty-one years of age, a citizen of the United States; that I have served over fourteen days in the Army of the United States during actual war; that I have never borne arms against the Government or given aid and comfort to its enemies; that said application No. 1842 is made for my exclusive benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person or persons whomsoever.

31 BENTLEY S. TURNER.

[Written across the face:] Canceled. See P. P. Sept. 30, 1872.

Sworn to and subscribed this 8th day of March, 1865, before—
WILLIAM SEARS,
1st Lieut., Commanding 1st N. Y. Indep't Batt-ry.

Application No. 1842.

STATE OF VIRGINIA, *County of Dinwiddie:*

MARCH 8TH, 1865.

I, Bentley S. Turner, of Franklin county and State of New York, being in the military service of the United States, do hereby apply to enter, under the provisions of the act approved March 21, 1864, amendatory of the homestead act approved May 20, 1862, and for

other purposes, a certain tract of land which F. A. Conwell, my duly authorized representative, is hereby authorized to designate at the foot of this application as my homestead and which I hereby agree to hold as my own selection.

BENTLEY S. TURNER.

Attest: WILLIAM SEARS,
1st Lieut., Commanding 1st N. Y. Indep't Batt-ry.

I, F. A. Conwell, duly authorized representative as named in the foregoing application, No. 1842, do hereby designate the
32 tract selected for his homestead as the S. W. ¼ of section 35, township 116 north, of range 32, containing 160 acres.

F. A. CONWELL.

Witness my hand and — this 3 day of May, 1865.

Attest: DANA E. KING, *Register.*

LAND OFFICE AT MINNEAPOLIS, *May* 3, 1865.

I, Dana E. King, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and that there is no prior valid adverse right to the same.

DANA E. KING, *Register.*

Officers and men.—Under the new law you can each secure in 30 days a title from the U. S. to a valuable 160 acres of land in the rich, healthy, and beautiful State of Minnesota, expunging part of the oath as to age, &c., filling blank dates, names, residence,
33 and having your commissioned commander acknowledge the oath and proxy, then inclose with ($20) twenty dollars to F. A. Conwell, care of John Kerns, receiver land office, Saint Peter, Minnesota.

F. A. CONWELL,
Vol. Chaplain 1st Minn. Infantry.

Homestead.

Receiver's receipt No. 1842; application No. 1842.

RECEIVER'S OFFICE, MINNEAPOLIS, *May* 3, 1865.

Received of Bentley S. Turner the sum of fourteen dollars — cents, being the amount of fees and one-half the compensation of register and receiver for the entry of S. W. ¼ of section 35, in township 116, of range 32, under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain."

$14. HEZEKIAH FLETCHER, *Receiver.*

Homestead.

LAND OFFICE.

Date below agrees with receipt & abstract.

W. D. H.

Application No. 7560.

34 I, Julia D. Graham, of Renville county, Minnesota, do hereby apply to enter, under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," the S. ½ of S. W. ¼ of section 35, in township 116, of range 32, containing 80 acres.

JULIA D. GRAHAM.

LAND OFFICE AT BENSON, MINNESOTA, *May* 7, 1877.

I, J. C. Braden, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and that there is no prior valid adverse right to the same.

J. C. BRADEN, *Register.*

Homestead.

(Affidavit.)

LAND OFFICE AT ——, *April 26th*, 1877.

I, Julia D. Graham, of Renville Co., Minn., having filed my application, No. 7560, for an entry under the provisions of the
35 act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear that I am over the age of 21 years and a citizen of the United States; that I am actually upon the land described in said application, and that this affidavit is made before the clerk of the court for — county in which said land is situated for the reason of great distance from the land office; that said application, No. 7560, is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever; neither have I abandoned an entry heretofore made under this act.

JULIA D. GRAHAM.

Sworn to and subscribed this twenty-sixth day of April, 1877, before—

[SEAL.] D. S. HALL,
Clerk of Dist. Court.

Homestead.

Receiver's receipt No. 7560; application No. 7560.

36 RECEIVER'S OFFICE, BENSON, MINN., *May* 7, 1877.

Received of Julia D. Graham the sum of fourteen dollars — cents, being the amount of fee and compensation of the register and receiver for the entry of S. ½ S. W ¼ of section 35, in township 116,

of range 32, under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain."

W. H. GREENLIEF, *Receiver.*

Homestead.

Duplicate receiver's receipt No. 7560; application No. 7560.

RECEIVER'S OFFICE, BENSON, MINN., *May* 7, 1877.

Received of Julia D. Graham the sum of fourteen dollars — cents, being the amount of fee and compensation of register and receiver for the entry of S. ½ S. W. ¼ of section 35, in township 116, of range 32, under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain."

$14. W. H. GREENLIEF, *Register.*

37 STATE OF MINNESOTA, *ss:*

District Court for the County of Renville.

To any person lawfully authorized to solemnize marriages within said State:

Know ye that license is hereby granted to join together as husband and wife John W. Whitney, of the county of Boone and State of Illinois, and Miss Julia D. Graham, of the county of Renville and State of Minnesota. Being satisfied by the oath of said John W. Whitney — personal consent of William D. Graham, father of Miss Julia D. Graham, that there is no impediment thereto, therefore this shall be your sufficient authority for solemnizing the marriage of said parties and making return thereof as provided by law.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at Beaver Falls, this seventh day of June, 1880.

WILLIAM W. McGOWAN, *Clerk.*

STATE OF MINNESOTA, *County of Chippewa,* } *ss:*

38 I hereby certify that on the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty, at Montevideo, in said county, I, the undersigned, a minister, did join in the holy bonds of matrimony, according to the laws of this State, John W. Whitney, of the county of Boone and State of Illinois, and Julia D. Graham, of the county of Renville, State of Minnesota.

DENNIS GOODSELL.

In presence of—
JOSEPH WHIPPLE,
HARRIET C. WHIPPLE,
Witnesses.

STATE OF MINNESOTA, } ss:
County of Renville, }

I, William W. McGowan, clerk of the district court Renville county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original marriage license of John W. Whitney and Julia D. Graham in the action herein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

39 Witness my hand and the seal of said court, at Beaver Falls, this 19th day of May, A. D. 1883.

[SEAL.] WILLIAM W. McGOWAN,
Clerk of the District Court.

Homestead No. 1.

LAND OFFICE, AT BENSON, *March* 22*d*, 1883.

I, Julia D. Whitney, of Brookfield, who made homestead application No. 7560 for the S. ½ S. W. ¼, sec. 35, T. 116, R. 32, do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before the clerk of the court, W. W. McGowan, at Beaver Falls, on the 19th day of May, 1883, by two of the following witnesses: Robert T. Whitnall, of Brookfield; Hugh B. Cannon, of Brookfield; Riley Foster, of Hector; Jas. S. Niles, of Hector.

JULIA D. WHITNEY,
Formerly Julia D. Graham.

LAND OFFICE, AT BENSON, MINN., *March* 29, 1883.

Notice of the above application will be published in the
40 Union, printed at Bird Island, which I hereby designate as the newspaper published nearest the land described in said application.

D. S. HALL, *Register.*

Notice to Claimant.

Give time and place of proving up and name and title of the officer before whom proof is to be made; also give names and post office and address of four neighbors, two of whom must appear as your witnesses.

LAND OFFICE, AT BENSON, MINNESOTA, *March* 29*th*, 1883.

Notice is hereby given that the foregoing-named settler has filed notice of her intention to make final proof in support of her claim, and that said proof will be made before W. W. McGowan, clerk of district court, at Beaver Falls, Minn., on May 19th, 1883, viz., Julia D. Whitney, formerly Julia D. Graham, homestead application No.

7560 for the south ½ southwest ¼, section 35, town. 116
41 north, of range 32 west. She names the following witnesses to prove her continuous residence upon and cultivation of said land, viz., Robert T. Whithall and Hugh B. Cannon, of Brookfield, Minn; Riley Foster and James S. Niles, of Hector, Minn.
4615. D. S. HALL, *Register.*

THE STATE OF MINNESOTA, } ss:
County of Renville, }

I, C. L. Lowanie, of lawful age, being duly sworn, on oath say that I was during all the time hereinafter named printer & publisher of Renville County Union, a weekly newspaper printed and published at the village of Bird Island, in said county, and of general circulation in said county, and that the annexed printed notice of intention to make final proof was taken from said newspaper, and was duly published therein once in each week for five successive weeks on the regular publication days of said paper, the days following, to wit: Apr. 12th, Apr. 19th, April 26th, May 3d, and May
42 10th, 1883, said publication commencing with No. 46, vol. IV, on the 12th day of April, 1883, and ending with No. 50, vol. V, on the 10th day of May, A. D. 1833, and that the printer's fees for publishing the same are $3.00.

C. L. LOWANIE.

Subscribed and sworn to before me this 18th day of May, A. D. 1883.

[SEAL.] T. M. PAINE,
Notary Public, Renville County, Minn.

Certificate of Authentication.

STATE OF MINNESOTA, } ss:
County of Renville, }

I, William W. McGowan, clerk of the district court for the 9th judicial district and county aforesaid, the same being a court of record, do hereby certify that T. M. Paine, before whom the annexed affidavit was taken, was at the same time of taking such affidavit a notary public in and for said county of Renville and duly authorized to take the same; that I am well acqainted with the handwriting of such officer and verily believe that the signature to the
43 jurat or certificate to said affidavit is genuine. I further certify that said instrument is executed and certified according to the laws of the State of Minnesota.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Beaver Falls, this 19th day of May, A. D. 1883.

[SEAL.] WILLIAM W. McGOWAN, *Clerk.*

Certificate as to Posting Notices.

LAND OFFICE AT BENSON, MINN., *May* 26, 1883.

I, D. S. Hall, register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 29th day of March, 1883.

D. S. HALL, *Register.*

Homestead Proof.

Final affidavit required of homestead claimant.

Section 2291 of the Revised Statutes of the United States.

I, Julia D. Whitney, formerly Julia D. Graham, having
41 made a homestead entry of the S. ½ of S. W. ¼, section No. 35, in township No. 116 of range No. 32, subject to entry at U. S. land office, Benson, Minn., under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statute-, and for that purpose do solemnly swear that I am a citizen of the United States; that I have made actual settlement upon and have cultivated said land, having resided thereon since the 7th day of September, 1877, to the present time; that no part of said land has been alienated except as provided in section 2288 of the Revised Statute-, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

JULIA D. WHITNEY,
Formerly JULIA D. GRAHAM.

45 I, William W. McGowan, clerk of the district court, do hereby certify that the above affidavit was subscribed and sworn to before me this 19th day of May, 1883, and this affidavit was taken in a recess and during the absence of the judge of this court.

WILLIAM W. McGOWAN,
Clerk of District Court, Renville Co., Minn.

Homestead Proof.

Testimony of witnesses.

HUGH B. CANNON, being called as witness in support of the homestead entry of Julia D. Whitney, formerly Julia D. Graham, for S. ½ of S. W. ¼, section 35, town. 116, range 32, testifies as follows:

Ques. 1. What is your occupation and where is your residence?
Ans. Farmer; Brookfield, Renville county, Minn.

Quest. 2. Have you been well acquainted with Julia D. Whitney, formerly Julia D. Graham, the claimant in this case, ever
46 since she made her homestead entry No. 7560?

Ans. I have.

Ques. 3. Was claimant qualified to make said entry? (State whether the settler was a citizen of the United States, over the age of twenty-one years, or the head of a family, and whether she ever made a former homestead entry.)

Ans. Citizen of the United States, over 21 years of age, the head of a family at time of making entry, and I beleive she never made a former entry.

Ques. 4. When did claimant settle upon the homestead and at what date did she establish actual residence thereon? (Describe the dwelling and other improvements, giving total value thereof.)

Ans. Settled and established residence September 7th, 1877, and built a house 12 x 24 feet; five hundred dollars.

Ques. 5. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact.)

47 Ans. Unmarried lady at time of entry; continuous residence.

Ques. 6. For what period or periods has the settler been absent from the land since making settlement and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. Continuous residence.

Ques. 7. How much of the homestead has the settler cultivated and for how many seasons did she raise crops thereon?

Ans. Seventeen acres.

Ques. 8. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No; agricultural.

Ques. 9. Has the claimant mortgaged, sold, or contracted to sell any portion of said homestead?

Ans. I believe she has not.

48 Ques. 10. Are you interested in this claim and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. I am not interested and believe settler has acted in good faith.

HUGH B. CANNON.

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed and sworn to before me this 19th day of May, 1883.

[SEAL.] WILLIAM W. McGOWAN,
Clerk of District Court, Renville Co., Minn.

(See note on fourth page.)

ROBERT T. WHITNALL, being called as witness in support of the homestead entry of Julia D. Whitney, formerly Julia D. Graham, for S. ½ of S. W. ¼, section 35, town. 116, range 32, testified as follows:

Ques. 1. What is your occupation and where is your residence?

Ans. Farmer; Brookfield, Renville county, Minnesota.

49 Ques. 2. Have you been well acquainted with Julia D. Whitney, formerly Julia D. Graham, the claimant in this case, ever since she made her homestead entry No. 7560?

Ans. I have.

Quest. 3. Was claimant qualified to make said entry? (State whether the settler was a citizen of the United States, over the age of twenty-one years, or the head of a family, and whether he ever made a former homestead entry.)

Ans. Citizen of the United States, over the age of twenty-one years; the head of a family, and, I believe, she never made a former entry.

Ques. 4. When did claimant settle upon the homestead and at what date did he establish actual residence thereon? (Describe the dwelling and other improvements, giving total value thereof.)

Ans. Settled and established residence May 7, 1877, and built a house 12 x 24 feet; five hundred dollars.

50 Ques. 5. Have claimant any family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact.)

Ans. Lady, unmarried at time of entry; continuous residence.

Ques. 6. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. Continuous residence.

Ques. 7. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. Seventeen acres; four crops.

Ques. 8. Are there any indications of coal, saline, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No; agricultural.

Ques. 9. Has the claimant mortgaged, sold, or contracted
51 to sell any portion of said homestead?

Ans. I believe she has not.

Ques. 10. Are you interested in this claim, and do you think the settler has acted in entire good faith in perfecting this entry?

A. I am not interested, and believe settler has acted in good faith.

ROBERT T. WHITNALL.

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed and was sworn to before me this 19th day of May, 1883.

WILLIAM W. McGOWAN,
Clerk of District Court, Renville Co., Minn.

JULIA D. WHITNEY, formerly Julia D. Graham, being called as a witness in her own behalf in support of homestead entry No. 7560 for S. ½ of S. W. ¼, section 35, town. 116, range 32, testified as follows:

Ques. 1. What is your name—written in full and correctly
52 spelled—your age, and post-office address?

Ans. Julia D. Whitney, formerly Julia D. Graham; 29 years; Hector, Renville county, Minn.

Ques. 2. Are you a native of the United States or have you been naturalized?

Ans. Native born.

Ques. 3. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. Settled and established residence September 7, 1877, and built a house 12 x 24 feet, shingle roof, board floor, four windows, one outside door; five hundred dollars.

Quest. 4. Of whom does your family consist, and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried state the fact.)

Ans. Unmarried lady at time of settlement; since married;
53 resides with husband.

Ques. 5. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and, if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. Continuous residence.

Ques. How much of the land have you cultivated and for how many seasons have you raised crops thereon?

Ans. 17 acres; 4 crops.

Ques. 7. Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No; agricultural.

Ques. 8. Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 9. Have you sold, conveyed, or mortgaged any portion of the land; and, if so, to whom and for what purpose?

54 Ans. No.

JULIA D. WHITNEY,
Formerly JULIA D. GRAHAM.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and sworn to before me this 19th day of May, 1883.

[SEAL.] WILLIAM W. McGOWAN,
Clerk of District Court, Renville Co., Minn.

Endorsed on back: Land office at Benson, Minn. Original application No. 7560. Final certificate No. 5706. Approved: D. S. Hall, register; H. W. Stone, receiver.

Homestead.

Final receiver's receipt No. 5706; application No. 7560.

RECEIVER'S OFFICE, BENSON, MINN., *May* 26, 1883.

Received of Julia D. Whitney the sum of four dollars — cents, being the balance of payment required by law for the entry of south half of the southwest quarter of section 25, in township 116,
55 N. of range 32 W., containing eighty acres, under section 2291 of the Revised Statutes of the United States. Com'rs "F," Feb. 20, 1883.

$4. H. W. STONE, *Receiver.*

Homestead.

Final certificate No. 5706; application No. 7560.

LAND OFFICE AT BENSON, MINN., *May* 26, 1883.

It is hereby certified that pursuant to the provisions of section No. 2291, Revised Statutes of the United States, Julia D. Whitney, formerly Julia D. Graham, has made payment in full for south half of the southwest quarter of section No. 35, in township No. 116 north, of range No. 32 W., 5th P. M., *of range No. 32 W., 5th P. M.,* containing eighty acres. Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said Julia D. Whitney shall be entitled to a patent for the tract of land above described.

D. S. HALL, *Register.*

Com'r "F," Feb'y 20, 1883.

56 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July* 12, 1866.

Register & receiver, Greenlief, Minn.

GENTLEMEN: I enclose herewith a diagram showing the designated line of route and the 10 and 20 mile limits of the Hastings, Minnesota River and Red River of the North railroad," for which a grant of lands is made to the State of Minnesota by the act of Congress approved July 4th, 1866.

The grant is for five alternate sections per mile, designated by odd numbers, with the right of indemnity for land disposed of from odd sections within 20 miles of the road, excepting, however, from the grant "any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purposes whatsoever," except the right of way
57 where the title is in the U. S.

The even or reserved sections within the 10-mile limit are

increased in price to $2.50 per acre and cannot be sold at private entry until after they have been first offered at that price. Pre-emption settler, upon compliance with the law, may, however, pay for such sections at the increased price, and 80 acres may be entered under the homestead law. In compliance with the instruction from the Secretary of the Interior of the 11th inst., you are hereby directed to withhold from sale and location, pre-emption settlement and homestead entry both the odd and even sections within the 10-mile limits and the odd sections within the 20-mile limits, as hereinafter mentioned. The odd sections within both limits are absolutely withdrawn and the even sections in ten-mile limits will only
58 be subject to settlement and entry under the pre-emption and homestead laws at $2.50 per acre, except in cases where legal inceptive rights had accrued to settlers under the pre-emption laws prior to the receipt of his order by you. In such cases the settlers, by the decision of the Secretary of the Interior of the 22d ult., will, upon compliance with that law, be allowed to pay for his claim at $1.25 per acre.

This grant excepts from its provisions any lands reserved or granted prior to its passage, giving only the "right of way" where the title shall remained in the U. S.; therefore all odd sections of land within the limits of this road which fall within the limits of any antecedent grant or reservation are excepted and excluded.

Diagrams showing the limits of prior grants for railroads are now in your office.

59 This order will take effect from the date of its reception at your office, and you will advise me of the precise time it may be received by you.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Endorsed: Filed Aug. 24, 1885. R. W. Bell, clerk.

STATE OF MINNESOTA:

In the District Court for the County of Ramsey.

THE HASTINGS & DAKOTA RAILWAY COMPANY
against
JULIA D. WHITNEY and JOHN WHITNEY.

SIRS: Please to take notice that the said defendants hereby appeal to the supreme court of the State of Minnesota from all that certain judgment rendered and entered in this court in the said action on the 12th day of May, 1885, in favor of the plaintiff
60 and against the defendants herein.

Yours, &c., M. O. LITTLE,
Defendants' Att'ys.

To Cole & Bramhall, plaintiff's attorneys, and R. W. Bell, clerk of said district court.

Due service of the foregoing notice of appeal is hereby admitted this 24 day of August, 1885, and the plaintiff hereby waives execution, service, and filing of any and all appeal bond and bonds herein for appeal and stay of execution and proceedings, and stipulates for a stay of all proceedings herein until the termination of the appeal herein as fully as though any and all bonds for appeal and for stay of proceedings were made and given by the defendant- and appellant- herein.

COLE & BRAMHALL,
Plaintiff's Attorneys.
R. W. BELL,
Clerk of Dist. Court.

Endorsed: Filed Aug. 24, 1885. R. W. Bell, clerk.

61 STATE OF MINNESOTA, } ss:
Ramsey County, }

I, R. W. Bell, clerk of the district court for the second judicial district in and for said county and State, do hereby certify and return to the hon. the supreme court of said State that the foregoing are full and true copies of the original summons and complaint, answer, reply, decision, judgment, proposed case, & notice of appeal in the return therein entitled, and that I have compared the same and they are full and true copies of said originals and of the whole thereof.

Witness my hand and the seal of said district court, at St. Paul, this 24th day of August, A. D. 1885.

[SEAL.] R. W. BELL, *Clerk.*

Endorsed: The Hastings and Dakota R'y Co. *vs.* Julia D. Whitney and John Whitney. Return to supreme court.

62 Endorsed: No. 4264. State of Minnesota supreme court. Hastings & Dakota Railroad Co., respondents, *vs.* Julia D. Whitney *et al.*, appellants. Return on appeal. Filed Sept. 12, 1885. Sam. H. Nichols, clerk.

63 *Notice of Trial.*

STATE OF MINNESOTA:

In Supreme Court.

HASTINGS & DAKOTA RAILWAY CO.
vs.
JULIA D. WHITNEY *et al.*

SIR: You will please to take notice that *in* the above-entitled action will be brought on for argument at the next general term of the supreme court aforesaid, appointed to be held in the capitol at city of Saint Paul, in the county of Ramsey, in said county, on the

6th day of October, 1885, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Yours respectfully, M. O. LITTLE,
Attorney for Appellant.

Dated Sept. 3, 1885.

To Cole & Bramhall, Esqrs., attorneys for resp's.

Endorsed: 4264. Supreme court. Hastings & Dakota R. R. Co. *vs.* Julia D. Whitney *et al.* Notice of trial. Due service of within notice is hereby admitted this 10th day of September, A. D. 1885. Cole & Bramhall, attorney- for pl'ffs. M. O. Little, attorney for appellant-. Filed Sept. 12, 1885. Sam. H. Nichols, clerk.

64 [Endorsed:] 4264. Supreme court. The Hastings & Dakota Railway Company, respondent, against Julia D. Whitney & John Whitney, appellants. Notice of issue. Last pleading served August 24, 1885. M. O. Little, attorney for appellant-. Cole & Bramhall, attorney- for respondent. Will the clerk please file this note of issue and enter the cause on the calendar for the Oct., A. D. 1885, term of this court. Yours, &c., M. O. Little, attorney for appellant-. Filed Sept. 12th, 1885. Sam. H. Nichols, clerk.

65 STATE OF MINNESOTA:

Supreme Court. General October Term, A. D. 1885.

TUESDAY MORNING,
October 13, *A. D.* 1885—9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

THE HASTINGS AND DAKOTA RAILWAY COMPANY, Respondent, *vs.* JULIA D. WHITNEY and JOHN WHITNEY, Appellant-. } No. 63. 4264.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision by counsel for the appellant upon printed paper, books, and briefs, and argued orally by counsel for the respondent and taken under advisement.

A true record.
Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.
Attest: SAM. H. NICHOLS, *Clerk.*

66 Endorsed: T. R. 247. E. 4264. M. State of Minnesota supreme court. The Hastings & Dak. R'y Co., resp't, *vs.*

Julia D. Whitney *et al.*, app't-. Copy of minutes of argument. Filed March 16, 1886. Sam. H. Nichols, clerk.

67 Supreme Court. October Term, 1885.

Syllabus.

THE HASTINGS AND DAKOTA RAILWAY COMPANY, Respondent,
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Appellants.

An act of Congress of July 4, 1866, in aid of the construction of a railroad grants to the State of Minnesota lands within certain limits with the exception, among others, of those to which it "shall," when the line of road is definitely located, "appear * * * that the right of pre-emption or homestead settlement has attached;" held, that lands of which there is a homestead entry of record valid upon its face are within the exception.

68 *Opinion.*

Supreme Court. October Term, 1885.

THE HASTINGS AND DAKOTA RAILWAY COMPANY, Respondent,
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Appellants.

The act of Congress of July 4, 1866, under which plaintiff claims title to the land in controversy, grants to the State of Minnesota (to whose rights plaintiff has succeeded) five alternate sections of land on each side of what is now plaintiff's road and provides that "in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved to the United States for any purpose whatever," the Secretary of Interior shall select for the purposes of the grant so much public land "as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the right of homestead or pre-emption settlement has attached as afore-
69 said: * * * Provided, That any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever be, and the same are hereby, reserved and excepted from the operation of this act."

The land in dispute is within what is known as the "granted" or "lands in place" limits of the grant.

The important question in the case is whether an alleged homestead entry of one Turner of the land in controversy took it out of the operation of the grant.

The homestead law provides that a citizen of the United States who is head of a family may enter 160 acres of unappropriated public lands subject "at the time the application is made" to pre-emption at $1.25 per acre, and that the person "applying" shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family * * * and that such application is made for his exclusive use and benefit; that his entry is made for the purpose of actual settlement and cultivation, * * *
and upon filing such affidavit with the register or receiver
70 and payment of prescribed fee "he shall thereupon be permitted to enter the amount of land specified." U. S. Rev. St., §§ 2289–2290.

A person desiring to make a homestead entry who, by reason of actual service in the Army or Navy of the United States, is unable to do the personal preliminary acts at the local land office required by the provisions preceding, "and whose family or some member thereof is residing on the land which he desires to enter and upon which a *bona fide* improvement and settlement have been made," may make the affidavit required by law before his commanding officer, and "upon such affidavit being filed with the register by the wife or other representative of the party the same shall become effectual from the date of such filing." U. S. Rev. St., § 2293.

Turner's alleged homestead entry was made under this provision of law (§ 2293). So far as the forms of the papers evidencing his entry are concerned, they appear to have followed exactly those prescribed in the circular instructions issued to the local land offices by the General Land Office. See Zohiskie's Public Land Laws (1877), 151, 155, 172, 173; 2 Lester's Land Laws, 253. We perceive
no reason why these forms were not properly prescribed, nor
71 why they were not sufficient to satisfy the law, and hence we are not able to agree to the first position taken by plaintiff's counsel, which we understand to be that the alleged homestead entry is void upon the face of the papers by which it is sought to be evidenced.

And this brings us to consider the counsel's second position, viz., that the entry if not void upon these papers is void upon the facts in the case.

It is admitted in pleading and found by the trial court that at the time when Turner's application was made and his affidavit filed no improvement had been made on the land, and that no member of Turner's family has ever at any time resided thereon.

The *terms* of the act of Congress except from the grant lands within its limits to which "it shall *appear*" that "the *right* of pre-emption or homestead settlement has *attached*." We italicise what seem to us to be emphatic words.

If we felt at liberty to put an original construction upon them, we should say that the exception is not of lands to which some person claims that a right of pre-emption or homestead settlement has attached or to obtain title to which, under the pre-emption or homestead laws, some merely formal steps have been taken by him,

72 and that a right of pre-emption or homestead settlement cannot be said to have attached except through compliance with the substantial provisions of law, which prescribes the manner and means in and by which such right is to be acquired. Such would seem to us to be the plain and natural signification of the words used.

As an original proposition it would therefore have seemed to us that upon the facts of this case found and admitted, as before stated, Turner's entry was invalid, illegal, null, and void and that it did not attach to the land or exclude or except it from the operation of the grant under which plaintiff claims; and this upon the ground that under the act of Congress (§ 2293) the *bona fide* improvement and settlement and the residence of some member of his family upon the land were indispensible conditions precedent to his right of entry and were entirely wanting, so that when plaintiff's road was definitely located, in March, 1867, this alleged entry, made in May, 1865, did not appear to have attached to the land so as to except it from the grant; and this would seem to be in accordance with the charge to the jury in Union P. R. Co. *vs.* Watts, 2 Dillon, 310.

But a long and almost unbroken series of rulings and holdings by the Land Department of the United States is to the con-
73 trary. They are to the effect that a homestead entry of record valid upon its face *per se* constitutes the land thus purporting to be entered land to which it appears that the right of homestead settlement has attached within the meaning of the various land grants which have been made in aid of the construction of railroads.

This result is effected simply by an entry of record valid upon its face, "without reference to the validity of the entry in fact."

Thomas *vs.* St. J. & D. C. R. Co., 2 Copp's Public Land Laws, 869.
White *vs.* H. & D. Co., *id.*, 876.
Dalton *vs.* So. Minn. R. Co., *id.*, 861.
Barbeau *vs.* So. Pacific R. Co., 9 Copp's Land Owner, 81.
Graham *vs.* H. & D. Co. (this case), 9 *id.*, 236.
Whitney *vs.* Maxwell, 10 *id.*, 104.
St. Paul, M. & M. R'y Co. *vs.* Rouse, 10 *id.*, 215.
H. & D. R. Co. *vs.* U. S., 11 *id.*, 172.
So. Minn. R. Ex. Co. *vs.* Gollipeau, 11 *id.*, 264.
St. P., M. & M. R. Co. *vs.* Foiseth, 12 *id.*, 39.
U. S. *vs.* N. P. R. & Co., 12 *id.*, 161.
Murphy *vs.* Howe, 12 *id.*, 168.
C., R. I. & P. R. Co. *vs.* Easton, 12 *id.*, 259.
Hamilton *vs.* N. P. R. Co., 12 *id.*, 277.

We have spoken of this series of rulings by the General Land Department of the United States as almost unbroken. If some rulings made in such cases as Kniskern *vs.* H. & D. R. Co., 2 Copp's Pub. Land Laws, 858, and Larson *vs.* St. P. & P. R. Co., *id.*, 862, and
74 possibly some earlier cases, are to be regarded as inconsistent

with these (as is not altogether clear), they must be treated as overruled by the later holdings above cited.

The act of Congress of June 2, 1872 (§ 2308, Rev. St. U. S.), evidently rests upon the propriety of a construction of the law like that given by the Land Department.

As to the weight to which the practical construction thus given to the land laws is entitled, we quote as fully applicable to this case what is said by the Supreme Court of the United States in U. S. *vs.* B. & M. R. Co., 98 U. S., 341, cited in K. P. R. Co. *vs.* A. R. Co., 112 U. S., 414: "Such has been the uniform construction given to the acts by all the Departments of the Government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

We may add that the cases of B. & M. R. Co. *vs.* Abink, 14 Nebraska, 96; A., T. & S. R. Co. *vs.* Pracht, 30 Kansas, 66; K. & P. R. Co. *vs.* Dunmerfer, 113 U. S., 629, appear to take or to tend towards the same view of the effect of the land-grant acts upon homestead and pre-emption entries taken by the Land Department; and the cases of U. S. *vs.* N. P. R. Co., 12 Copp's Land Owner, 161, and Hamilton *vs.* N. P. R. Co., 12 *id.*, 277, show that as to the Dunmerfer case this is the understanding of the Department itself.

Following the construction of the General Land Office in cases of this kind, we are compelled to hold that Turner's entry, being of record and valid upon its face, took the land out of the operation of the grant; and hence the judgment appealed from, which was for plaintiff, is reversed.

BERRY, *J.*

Endorsed: 4264. M. State of Minnesota supreme court. The Hastings & Dakota R'y Co., respondent, *vs.* Julia D. Whitney *et al.*, appellants. Opinion and syllabus. Filed M'ch 1st, 1886. Sam. H. Nichols, clerk. Oct. term, 1885. Berry, J.

Bill of Costs and Notices of Taxation.

STATE OF MINNESOTA:

In the Supreme Court.

HASTINGS & DAKOTA RAILWAY COMPANY, Plaintiff & Respondent,
against
JULIA D. WHITNEY *et al.*, Defendant & Appellant.

Costs by statute	$25 00
4 affidavits	1 00
Clerk's fees (to be taxed)	9 50
Paid fees of clerk of district court making return on appeal	10 50
Paid copy of return for printer	5 00
Paid for printing paper book and brief	26 50
	$77 50

STATE OF MINNESOTA, } ss:
County of Hennepin, }

M. O. Little, being duly sworn, says that he is the attorney of the appellant in the above-entitled action, and that the above-specified items of disbursements have been necessarily made and incurred therein by said appellant upon the appeal herein; that the said several sums were reasonable amounts to be paid for the services mentioned in the above list of items.

M. O. LITTLE.

Subscribed and sworn to before me this 9th day of March, A. D. 1886.

[L. S.] F. HOOKER,
Notary Public, Minn.

78 I hereby allow and tax the within costs and disb'ts in favor of appellant at $77.50 this 13th day of M'ch, 1886.

Attest: SAM. H. NICHOLS, *Clerk.*

SIR: Take notice that I shall apply to the clerk of said court on the 13th day of March, A. D. 1886, at ten o'clock in the forenoon, to tax and insert in the judgment then and there to be entered in favor of the appellant and against the respondent the foregoing items of costs and disbursements.

M. O. LITTLE,
Att'y for Appellants.

To Cole & Bramhall, Esqrs., att'ys for respondent.

COUNTY OF HENNEPIN, *ss:*

M. O. Little, being duly sworn, says he is the attorney for appellant in the within-entitled action; that he served the within notice and affidavit on Cole and Bramhall, attorneys for respondents within named, on the 9th day of March, 1886, by depositing a true copy thereof in the post office of Minneapolis, duly folded and directed to said attorneys at St. Paul, Minnesota, where they reside; that affiant resides at Minneapolis aforesaid & that there is a regular daily communication by mail between said places; that affiant prepaid the required postage on said notice.

M. O. LITTLE.

Subscribed and sworn to before me this 12 day of March, 1886.

[Notarial Seal, Hennepin Co.]

A. H. MUNN,
Notary Public, Hennepin Co., Minn.

79 Endorsed: 4264. State of Minnesota supreme court. H. & D. R. R. Co. against Julia Whitney *et al.* Notice of taxation of costs. Filed March 13th, 1886. Sam. H. Nichols, clerk. M. O. Little, attorney for appellant.

80 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1885.

THE HASTINGS AND DAKOTA RAILWAY COMPANY, Respondent,
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Appellants. } No. 63.

Appeal from district court, second judicial district, county of Ramsey.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1885, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things reversed, and that the appellant above named have judgment accordingly.

Entered M'ch 1st, A. D. 1886.

By the court.

Attest: SAM. H. NICHOLS, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: SAM. H. NICHOLS, *Clerk.*

81 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1885.

THE HASTINGS AND DAKOTA RAILWAY COMPANY, Respondent,
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Appellants. } No. 63.

Pursuant to an order of court duly made and entered in this cause on the first day of March, A. D. 1886, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things reversed.

And it is further determined and adjudged that the appellants above named do have and recover of said The Hastings & Dakota Railway Company, respondent herein, the sum and amount of seventy-seven dollars and fifty cents ($77.50), costs and disbursements in this cause in this court, and that said appellants have execution for the enforcement thereof.

Dated and signed this sixteenth day of March, 1886.

By the court.

Attest: SAM. H. NICHOLS, *Clerk.*

82 *Statement for Judgment.*

Costs allowed by statute	$25 00
Clerk's fees for making return	10 50
Printer's fees for printing paper, book, & brief, &c.	26 50
Clerk's fees, supreme court	9 50
4 affidavits	1 00
Copying return for printer	5 00
	$77 50

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 16 day of M'ch, A. D. 1886.

SAM. H. NICHOLS, *Clerk.*

Endorsed: 4264. State of Minnesota supreme court. Transcript of judgment. Filed March 16, A. D. 1886, at — o'clock —. m. Sam. H. Nichols, clerk. M. O. Little, att'y for app't. Page No. 277, Book "H."

83 Endorsed: 4264. State of Minnesota supreme court. The Hastings & Dakota R'y Co., resp'ts, *vs.* J. D. Whitney *et al.*, app't-. Copy of order for judgment. Filed M'ch 16, A. D. 1886. Sam. H. Nichols, clerk. Entered on page 180, Book "E."

84 Endorsed: No. 4264. State of Minnesota supreme court. The Hastings & Dakota Railway Company, resp't, against Julia D. Whitney *et al.*, appellants. Judgment-roll. Filed March 6, 1886. Sam. H. Nichols, clerk. M. O. Little, attorney for appellant-.

85 To the Honorable justices of the Supreme Court of the United States:

And now comes the Hastings and Dakota Railroad Company, a corporation duly organized, incorporated, and existing under and by virtue of the laws of the State of Minnesota, by Gordon E. Cole, its attorney, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between The Hastings and Dakota Railroad Company, plaintiff, and Julia D. Whitney and John Whitney, her husband, defendants, in the supreme court of the State of Minnesota, being the highest court of law or equity of the said State in which a decision could be had in said *writ*, and in which a final judgment was rendered against it, the plaintiff, on the

sixteenth day of March, A. D. 1886, in said suit, wherein was drawn in question the constructions of a statute of the United States, and the decision was against the title, right, and privilege set up
86 and claimed under such statute, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said The Hastings and Dakota Railroad Company—

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

GORDON E. COLE, *Attorney.*

Allowed:

JAMES GILFILLAN,
Chief Justice of Supreme Court of Minnesota.

Endorsed: Petition in writ of error. Rec'd and filed March 22, A. D. 1886. Sam. H. Nichols, clerk. Gordon E. Cole, pl'ff's att'y, St. Paul, Minn.

87 Supreme Court of the United States.

THE HASTINGS AND DAKOTA RAILROAD COMPANY
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

Know all men by these presents that we, George E. Skinner and H. W. Eddy, of the county of Ramsey and State of Minnesota, are held and firmly bound unto Julia D. Whitney and John Whitney, her husband, of the county of —— and State of Oregon, in the sum of five hundred dollars, to be paid to the said Julia D. Whitney and John Whitney, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this sixteenth day of March, A. D. 1886.

Whereas the above-named The Hastings and Dakota Rail-
88 road Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named The Hastings and Dakota Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEO. E. SKINNER. [SEAL.]
H. W. EDDY. [SEAL.]

Sealed and delivered in presence of—
OWEN MORRIS.
A. M. CROSBY.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

George E. Skinner and H. W. Eddy, to me known to be the persons who signed and executed the foregoing bond, being duly sworn, depose and say, and each for himself saith, that he is worth double the amount specified in this bond, to wit, the amount of one
89 thousand dollars above his just debts and liabilities.

GEO. W. SKINNER.
H. W. EDDY.

Subscribed and sworn to before me this 16th day of March, A. D. 1886.

[SEAL.] OWEN MORRIS,
Notary Public, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 16th day of March, 1886, personally came before me George E. Skinner and H. W. Eddy, the persons who executed the foregoing bond, and acknowledged that they did so as their free act and deed.

[SEAL.] OWEN MORRIS,
Notary Public, Minn.

I approve the above bond and the sufficiency of the sureties thereto.

Dated St. Paul, March 16, 1886.

JAMES GILFILLAN,
Chief Justice of Supreme Court of Minnesota.

Endorsed: Bond in writ of error. Rec'd and filed March 22d, A. D. 1886. Sam. H. Nichols, clerk. Gordon E. Cole, pl'ff's att'y, St. Paul, Minn.

90 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings and also in the rendition of judgment of a plea which is in the said the supreme court of Minnesota, before you or some of you, being the highest court of law or equity of said State in which a decision — in the said suit between The Hastings and Dakota Railroad Company, plaintiff, and Julia D. Whitney and John Whitney, her husband, defendants, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, and privilege set up and claimed under such statute, a manifest error hath happened, to the great damage of the said The Hastings and Dakota Railroad Company, as by its complaint appears, we, being willing that the
91 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of March, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

92 [Endorsed:] Original. Supreme Court of the United States. The Hastings and Dakota Railroad Company *vs.* Julia D. Whitney *et al.* Writ of error. Rec'd and filed M'ch 22, 1886. Sam. H. Nichols, clerk. Gordon E. Cole, pl'ff's att'y, St. Paul, Minn.

93 UNITED STATES OF AMERICA, *ss:*

To Julia D. Whitney and John Whitney, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Hastings and Dakota Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixteenth day of March, A. D. 1886.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of Minnesota.

94 State of Minnesota Supreme Court.

THE HASTINGS & DAKOTA RAILROAD COMPANY
vs.
JULIA D. WHITNEY and JOHN WHITNEY, Her Husband.

Due personal service on me of a citation in a writ of error to Su-

preme Court of the United States in above cause admitted this sixteenth day of March, 1886.

M. O. LITTLE,
Defendants' Att'y.

Endorsed: (Original.) Supreme Court of the United States. The Hastings and Dakota Railroad Company *vs.* Julia D. Whitney *et al.* Citation in writ of error, &c. Rec'd and filed M'ch 22, 1886. Sam. H. Nichols, clerk. Gordon E. Cole, pl'ff's att'y, St. Paul, Minn.

95 STATE OF MINNESOTA, } *ss:*
Supreme Court, }

I, Sam. H. Nichols, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the original papers, record, and judgment-roll in the within-entitled action remaining on file and of record in my office, and that the same is a true and authentic transcript thereof and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court, at the capitol, in the city of St. Paul, this 21st day of July, A. D. 1886.

[Seal of the Supreme Court, State of Minnesota.]

SAM. H. NICHOLS,
Clerk of the Supreme Court, Minnesota.

Endorsed on cover: Minnesota supreme court. No. 310. The Hastings & Dakota Railroad Company, plaintiff in error, *vs.* Julia D. Whitney and John Whitney. Filed August 6, 1886.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1888.

No. 310.

HASTINGS & DAKOTA R. R. CO.,
Plaintiff in Error,

vs.

JULIA D. WHITNEY ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GORDON E. COLE,
Attorney for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST PAUL.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1888.

No. 310.

HASTINGS & DAKOTA RAILROAD CO.,

Plaintiff in Error,

vs.

JULIA D. WHITNEY AND JOHN WHITNEY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error brought this action in the district court of Ramsey county, in the state of Minnesota, to assert its right as against the defendant to the lands in controversy, claiming the same because such lands lie within the place or ten-mile limits of a grant

of lands to the state of Minnesota for the benefit of plaintiff's railroad, made by the congress of the United States by an act entitled "An act making an additional grant of lands to the state of Minnesota in alternate sections, to aid in the construction of railroads in said state," approved on the 4th day of July, 1866.

See p. 169, Vol. 2, *Lester's Land Laws.*

It was granted and transferred by the legislature of the state of Minnesota, to the plaintiff, in and by an act of the legislature of the state of Minnesota, entitled "An act to accept the grant, and in execution of the trust made and created in and by an act of congress entitled 'An act making an additional grant of lands to the state of Minnesota in alternate sections to aid in the construction of railroads in said state, approved July 4, 1866,' approved March 7th, 1867."

So far as material, it is as follows:

"Be it enacted, etc.

"Sec. 1. That the lands, rights, powers and privileges granted to and conferred upon the state of Minnesota in and by an act of congress entitled 'An act making an additional grant of lands to the state of Minnesota in alternate sections to aid in the construction of railroads in said state, approved July 4, 1866,' be and the same are hereby accepted upon the terms, conditions and restrictions therein presented, so far as the same are applicable, to aid in the construction of a railroad from Hastings, etc."

"Sec. 2. All the lands, interests, rights, powers and privileges granted and conferred upon the state of Minnesota for the purpose of aiding, etc., are hereby granted to and vested in the, etc.," giving the then name of plaintiff, which name has been duly changed to its present name as admitted by pleadings. Ch. 9, Special Laws of Minnesota, 1867.

Plaintiff, in conformity to all the provisions of each act of congress, and of the state of Minnesota, and within the time therein limited, prior to the com-

mencement of this action, built and completed the said railroad, and in all things complied with said acts and with the terms of all the provisions of any and every act of the congress of the United States or of the state of Minnesota relating thereto, and caused its railroad within and through the counties named in said acts and upon the line therein designated, to be definitely located and staked out upon the ground, and maps thereof to be filed as required by law, along its whole route and opposite the land in controversy, on or about the 7th day of March, 1867.

All these allegations are admitted in the answer. The record as printed is not properly folioed, but the first thirteen folios inclusive, of the complaint are admitted by the answer and terminate in the complaint as drawn and folioed at the words "March 1867" in the last line of the next to the last paragraph on page 3 of the record as printed, counting 100 words to a folio, which is the rule in Minnesota, where the statute provides, "the term folio, when used as a measure for computing fees or compensation, or in any legal proceedings, means 100 words, counting every figure necessarily used as a word; and any portion of a folio, when in the whole draft or paper there is not a complete folio, and when there is any excess over the last folio, shall be computed as a folio."

Page 71, *Gen. Stat. Minn. 1878.*

For the admission, see folio 16 of the record; and for the allegations referred to, folios 1 to 9 of the record.

The location of the lands within the place limits is shown by the testimony of the land commissioner of the plaintiff in error. (Folio 27 of the record.)

Folio 16 of the complaint commences with the word "part" in the tenth line of page 4 of the record.

There is a clerical error in printing the record. After the word "family" in the ninth line from the bottom, page 4 of the record, the following clause is omitted: "was then residing or ever did reside on said land, and no improvement had ever been made thereon by the affiant or any member of his family." The twentieth folio of the complaint ends with the word "thereof" in the last line but one on page 4 of the record. These allegations are also admitted by the answer. (See folio 16, printed record.)

In addition to the admissions of the pleading, however, with reference to the defendants' title, full proof was introduced by the plaintiff in error, by the records of the land department. (Exhibit A, page 11 of the record.) The allegations of the complaint also, with reference to the making of a homestead entry upon the land in controversy by defendant Julia D. Whitney, and the patenting of the same to her as alleged in the complaint, are admitted in the answer. See page 7 in the printed record. All the foregoing facts are found by the court, by which the action was tried. (See pp. 8 and 9 of the printed record.)

The facts admitted, proved and found, may be briefly summarized as follows:

On July 4th, 1866, an act of congress granted the lands in controversy, by grant *in præsenti*, to the state of Minnesota, for the benefit of the plaintiff's railroad. On the 7th of March, 1867, the land in controversy lying within the place limits of said grant, was with other similar lands duly granted and transferred to the plaintiff by an act of the legislature of said state. On the 7th day of March, 1867, the plaintiff in error's map of definite location was filed in the office of the comissioner of the general land office. On the 8th day of

May, 1865, one Bentley S. Turner, then being a soldier in the army of the United States, and actually with his regiment in the state of Virginia, made an affidavit and caused the same to be filed in the local land office of the district wherein the land in controversy was situated. Said affidavit was made before his commanding officer in the state of Virginia, and stated that said Turner was the head of a family and a citizen of the United States, and a resident of Franklin county, New York. Application was made through one Conwell, whom said Turner constituted as his attorney for that purpose, by appointment indorsed upon or appended to said affidavit, to enter a homestead; said affidavit did not state that Turner's family or any member thereof was residing on the land, or that there was any improvement thereon. And as a matter of fact, no member of his family was then residing or ever did reside on said land, and no improvement whatever had ever been made thereon by anyone. Thereupon, being paid their fees by said Conwell, the register and receiver of said land office allowed said entry, and the same stood upon the records of said local land office and upon the records of the general land office, uncancelled until September 30th, 1872, when said entry was cancelled by the proper officers of the United States. See *Findings of the Court*, page 9 of the printed record.

Turner made no selection of said land, and at the time of his affidavit evidently had no knowledge of what land would eventually be selected, or whether it would be selected in Minnesota or Texas. His application is as follows:

The plaintiff in error had judgment in the district court, and the defendant in error removed the case by appeal to the supreme court of the state of Minnesota, being the highest court of the state in which a decision in the suit could be had.

Sec. 1 of Art. 6 of the constitution of the state of Minnesota, provides as follows:

"Section 1.—Judicial power. The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace and such other courts inferior to the supreme court as the legislature may from time to time establish by a two-thirds vote."

Section 5, page 858 of the Gen. Stat. of 1878, being chapter 86, under the title "Appeals in civil actions," provides:

"Section 5.—Powers of appellate court. Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all the property and rights lost by the erroneous judgment."

The supreme court simply reversed the judgment but did not order a new trial, and a writ of error was sued out from this court. (See folios 75 and 81 of record.)

The act of congress of July 4, 1866, making the grant for the benefit of the plaintiff, provided, that "any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act."

The terms of the act of congress also excepted from the grant, "lands within its limits, to which it shall appear that the right of pre-emption or homestead settlement has attached," etc.

ASSIGNMENT OF ERRORS.

First: The court below, to-wit, the supreme court of the state of Minnesota, erred in deciding against the title and right to the land in controversy specially set up and claimed by the plaintiff in error in its complaint under the statute of the United States, to-wit, the act entitled "an act making an additional grant of lands to the state of Minnesota, in alternate sections, to aid in the construction of railroads in said state," approved on the 4th day of July, 1866.

Second: It erred in deciding that the alleged homestead entry of Bentley S. Turner was not void on its face.

Third: It erred in deciding that on a bill in equity brought by the plaintiff, to whom the lands in controversy had neither been patented nor listed, against the defendant who held the apparent legal title by virtue of a patent from the United States, the alleged homestead entry of Turner if not void upon its face but void in fact, because not authorized by law, and for want of any jurisdiction in the land officers to allow it, could not be declared void as against the plaintiff.

Fourth: It erred in holding that "a long and almost unbroken series of rulings and holdings by the land department of the United States had held to the effect that a homestead entry of record, valid upon its face, *per se* constitutes the land thus purporting to be entered land, to which it appears that the right of homestead

settlement has attached within the meaning of the various land grants which have been made in aid of the construction of railroads and operates as a withdrawal of such lands from a subsequent grant."

Fifth: It erred in holding that if such rulings existed they were binding upon the court, or that the court was bound to follow them.

Sixth: It erred in holding that if Turner's homestead entry was void in fact, the title of plaintiff in error to the land in controversy was not an earlier and better title than that of defendant in error, and in holding that a void homestead entry could or did withdraw the land in controversy from the operation of the grant to plaintiff in error.

POINTS AND AUTHORITIES FOR THE PLAINTIFF IN ERROR.

I.

Jurisdiction.

I do not suppose that any question of jurisdiction will be made by counsel or occur to the court upon this record; but as a matter of precaution, as the court may not be familiar with the effect of a reversal in the state of Minnesota, I have printed the statute. The supreme court of the state had the power to absolutely reverse without more or to grant a new trial; no property had been lost by the judgment of the court below, and no restitution was necessary; unqualified reversal of the judgment against the defendant left her in the same attitude as she was before suit was commenced. Had the supreme court not intended

that their judgment should be an absolute finality and terminate the proceedings, it would have ordered a new trial.

The following cases may be cited in support of the jurisdiction, although I believe none of them are so free from doubt as the case at bar.

Thus, in *O'Dowd vs. Russell, 14 Wal. 402*, in a suit against principal and sureties on a bond, the judgment below was in favor of Walker because it was held that he had been discharged by the bankrupt law, and against the sureties because they could not avail themselves of the discharge of their principal. The court affirmed the judgment as to the sureties and reversed it as to Walker, because the court held that the exemption under the bankrupt law was not a defense. The court held that both judgments were final, and that both were brought under review by the writ of error.

In *Weston vs. City Council of Charleston, 2 Pet. 449*, the trial court granted a prohibition to restrain the city council of Charleston from taxing stock. The appellate court simply reversed the order for a prohibition, and thereupon the writ of error was brought. The court said "the question which was decided by the appellate court is the very question on which the revising power of this tribunal is to be exercised," and the court sustained the writ.

In *Atherton vs. Fowler, 1 Otto, 143*, the appellate court reversed and modified the judgment below, but did not permit further preceedings in the inferior court, if the defendants consented to the modification. The record showed that the consent had been given. The litigation was ended by the decision of the su-

preme court. No other discretion was left in the court below, and the writ of error was sustained.

In *Mower vs. Fletcher*, *114 U. S. 127*, this court held that the judgment by a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final.

II.

The Turner homestead entry was void on its face.

By the provisions of section 2293 of the Revised Statutes of the United States, which section was enacted as a law on the 21st of March, 1864, and was in force at the time of the attempted entry of Turner, it is provided as follows:

"In case of any person desirous of availing himself of the benefits of this chapter, and by reason of actual service in the military or naval service of the United States is unable to do the personal preliminary acts at the district land office which the preceding sections require, *and whose family or some member thereof is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made*, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law and with like penalties as if taken before the register and receiver, and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law."

The proceedings in the matter of Turner's homestead entry were void on their face. If the register and

receiver are *quasi* judicial officers, their acts are to be tested by the same rule as govern those of courts of special and statutory jurisdiction. Unlike courts of general juristion, no presumptions are indulged in, in favor of their jurisdiction, but it must be shown affirmatively by the record. *Grignon's Lessee vs. Astor, 2 How. 319-341.* This decision has been followed and approved in a recent case in this court.

In *Comstock vs. Crawford, 3 Wal. 396-403*, the court said:

"It is well settled that when the jurisdiction of a court having limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error, or mere irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. By the statute of Wisconsin under which the administrator was appointed, the only facts necessary to give the probate court jurisdiction, were the death of the non-resident intestate, and the possession by him at the time of personal property within the territory. Both of these facts are recited in the record."

In *Mohr vs. Manierre, 11 Otto, 417-425*, the court affirmed the decision in *Grignon's Lessee vs. Astor*, and quoted from the opinion in that case, saying:

"It was sufficient to call the powers of the court into exercise that the petition stated facts upon the existence of which the law authorized the sale."

In *Grignon's Lessee vs. Astor*, followed and approved by the cases last cited, this court says, referring to courts of special and limited jurisdiction, that:

"They are created on such principles, that their judgments taken alone are entirely disregarded, *and*

the proceedings must show their jurisdiction. The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise is of the latter description; *every requisite for either must appear on the face of their proceedings or they are nullities.*"

2 How. p. 341.

Judgments of courts of record and of general jurisdiction are supported by the strongest presumptions in their favor, but it will not be claimed that the register and receiver is such a tribunal; they act in the exercise of a special, limited and statutory jurisdiction.

Lying at the threshold of that jurisdiction, and a condition precedent to its exercise, were the facts that Turner had a family, or some member thereof, residing on the land which he desired to enter, and that a *bona fide* settlement and improvement had been made on such land, and, implied in these, the further fact that he had selected certain land upon which he desired to make a homestead entry and was able to describe it.

The supreme court of the state adheres altogether too literally to the letter of the statute in prescribing the form of the affidavit, and, in doing so, disregards its entire spirit, which certainly never contemplated

that a party who had never seen or decided upon any particular tract of government land as his future homestead, and no member of whose family had seen or decided upon or resided on, or made any improvement on any portion of the public domain, should have the power to send out a roving commission to locate such lands as his agent might deem fit, or that the officers of the land office should have the power and jurisdiction to dispose of the public domain in direct violation and disregard of the provisions of the law, and with no facts alleged before them showing that the conditions precedent to a valid homestead entry existed, much less to make such action final and binding upon all courts who might thereafter investigate the question.

In fact, the proceedings are not only void on their face within the decisions to which we have referred, because not affirmatively showing jurisdiction in the officers, but they are void on their face because they affirmatively show that there was no jurisdiction. It not only fails to appear by the proceedings that there was any improvement on the land, or any settlement by any member of Turner's family, but it affirmatively appears that there had been none, and indeed, that Turner had selected no land; and it was not until two months after he swore to his affidavit, as appears by the proceedings themselves, that the selection of Conwell first identified the tract in such a manner that there could have been such settlement and improvement.

III.

If not void on their face, they were void in fact, for want of jurisdiction of the officers to allow the entry.

If the proceedings relating to the Turner homestead entry were not void upon their face, yet it is found as a fact, and is conceded, that the essentials and conditions precedent to a valid homestead entry and to conferring any jurisdiction upon the land officers to dispose of this tract of public land, did not exist. That, as a matter of fact, there was neither settlement nor improvement upon the land, nor indeed any land whatever in existence known and designated as the future homestead entry of Turner, upon which there could have been improvement or settlement at the time that he signed his affidavit and application; and the supreme court of the state is of the opinion that upon those facts found and admitted, as an original proposition, Turner's entry was invalid, illegal and void, and that his homestead entry had not attached to the land, or excluded or excepted it from the operation of the grant under which the plaintiff claims; and this upon the ground that under the act of congress section 2293 U. S. revised statutes, the *bona fide* improvement and settlement, and the residence of some member of his family upon the land, were indispensable conditions precedent to his right of entry, and were entirely wanting, so that when plaintiff's road was definitely located in March, 1867, this alleged entry made in May, 1865, did not appear to have attached to the land so as to except it from the grant. This, they say, would seem to be in accordance with the charge to the jury, in *Union P. R.*

R. Co. vs. Watts, 2 Dillon, 310, (page 28, printed record,) but still they deny us relief. The same court has once before fallen into the same error upon precisely the same question but upon different grounds.

See *State of Minnesota vs. Batchelder, 1 Wallace 109.*

On the 3rd of March, 1857, congress passed a joint resolution which provided that where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the 16th or 36th sections, (which had been granted to the state of Minnesota for school purposes), before the said sections shall have been or shall be surveyed, and if such settlers can bring themselves within the preemption act, then the right of preference to such sections or portions of them so settled and occupied shall be in them the same as if such sections had not been previously reserved.

An action of ejectment was brought by the state of Minnesota against parties who claimed under the rights given by such resolution. The plaintiff replied that the preemptor did not settle on the premises; did not build a house there nor make any improvements prior to the government survey of the sections. (It is found and admitted as a fact in this case that there was no settlement and no improvements upon the land in controversy.)

The Supreme Court of the State of Minnesota held, as it now holds, that the patent was conclusive; that the decision of the register and receiver in allowing the pre-emption could not be examined by the court; but this court said:

"These questions have been so often before this court, and were so fully considered in the last case,

(*Lindsey vs. Hawes, 2 Black. 554, 557, 558,*) where the authorities are collected, that it would be a waste of time to re-examine them. A court of equity will look into the proceedings before the register and receiver, and even into those of the land office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are *ex parte* and summary, before these officers, and no notice is provided for by the pre-emption laws as to parties holding adverse interests; nor do they contemplate a litigation of the right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted."

State of Minnesota vs. Bachelder, 1 Wal. 109.

(What forms and instructions of the land office the Supreme court of the state may have discovered, and whether those in the present case follow those forms, it is conceived, is entirely immaterial; indeed, where the usage and custom of the land office was neither pleaded nor proven, and no allusion made to it on the trial or at the hearing, either in the District or the Supreme Court, we enter a mild protest against such researches outside of the case on the part of the court, which we have no opportunity to meet and combat.)

The following cases support our contention:

Lindsey vs. Hawes, 2 Black. 554.

Cunningham vs. Ashley, 14 How. 377.

Comegys vs. Vasse, 1 Peters, 212.

Garland vs. Wynne, 20 How. 8.

Barnard's heirs vs. Ashley's heirs, 18 How. 43.

Little et al. vs. State of Wisconsin et. al., 22 How. 192.

In *Cunningham vs. Ashley*, the court said:

"The officers of the government are the agents of the law; they cannot act beyond its provisions, nor make compromises not sanctioned by it."

In *Garland vs. Wynne*, cited ante, the bill was filled by Wynne, who alleged that he would have been given a patent but for Garland's proving a pre-emption right in the land. The land had been patented to Garland; Wynne proved that he had a preference of entry, but the register and receiver of the local land office decided in favor of Garland. The bill was filed to compel Garland to convey the land to Wynne.

"The question is," say the court, "have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws and to overrule the decision of the register and receiver confirmed by the commissioner in a case where they had been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws to the destruction of another's right who had a preference of entry. The general rule is, that where several parties set up conflicting claims to property with which a special tribunal may deal as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. *We announce this to be the settled doctrine of this court.*"

In *Little et al. vs. State of Arkansas et al.*, the question was, as it usually has been in such cases, whether the affidavit of settlement and cultivation under the pre-emption laws, upon which the adjudication of the register and the receiver had been made, was true or false. The court held the adjudication of the register and receiver to be subject to revision in the courts of justice on proof that the entry was

obtained by fraud, and the imposition of false testimony on those officers, as to settlement and cultivation. If settlement and cultivation is a condition precedent to the jurisdiction of the officers, there would seem to be a stronger reason why the court should revise the acts of those officers, upon proof that there had been no settlement and cultivation, in a case where the affidavits were silent, than in a case where they expressly declared such settlement and cultivation.

In *Lindsey vs. Hawes*, cited *ante*, the court, in citing these cases, said:

"We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by the defendants on this branch of the case."

It seems too plain for comment that the jurisdiction of the register and receiver to permit this homestead entry, and thus dispose of a portion of the public domain, depended and was limited, as it has always been held to be in pre-emption cases, upon settlement and improvement. These acts lie *in limine*, and I am unable to see why the case of *Elliot vs. Peirsol*, *1 Peters, 328, 340*, is not a conclusive authority here; where the court said:

"Where a court has jurisdiction it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other court; but if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over the subject may be inquired into in

every court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

There seems to be a still stronger reason for applying this principle to officers of the executive department of the government, who are exercising only limited and *quasi*-judicial powers.

In *Silver vs. Ladd*, 7 *Wal.* 219, a donation certificate was granted to one Thomas, and was set aside by the commissioner of the land office on the ground that Thomas was not the head of a family. On appeal to the secretary of the interior the act of the commissioner was affirmed on the gound that she was not a settler on the land. The supreme court of Oregon whose judgment was reviewed, held the certificate void because she was a person who could not take land, being an unmarried female. A patent had been issued to the defendant after the certificate to Thomas had been set aside. The court said:

"If for any of the reasons above stated, the action of the commissioner can be sustained, then the judgment of the supreme court of Oregon must be affirmed; if it cannot, then the patents issued to the defendants after the certificate of Thomas was wrongfully set aside, must inure to the benefit of the plaintiff representing her equitable title;" just as the patent issued to the defendant in error in this case, must inure to the benefit of the plaintiff in error if the register and receiver erred in permitting the Turner entry; or if there was no valid homestead entry existing on this land at the time of the location of the railroad of the plaintiff in error, then it passed to the plaintiff in error under its grant.

The register and receiver in permitting the entry of the defendant in error, misconstrued the law in

holding that the Turner entry, although void, because there had been no settlement or improvement in fact upon the lands as required by act of congress, operated to withdraw the land from the plaintiff's grant and therefore took from the plaintiff in error, that to which it had acquired a legal title under the sanction of the act of congress making its land grant.

To this state of facts the case of *Johnson vs. Towsley* exactly applies. In the course of his opinion Mr. Justice Miller delivering the opinion of the court said:

"But we are not prepared to concede that when, in the application of the facts as found by the register and receiver they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this court decided in the case of *Minnesota vs. Bachelder*, *1 Wal. 109*, and in *Silver vs. Ladd*, *7 Wal. 219*."

This court has constantly asserted the right of the proper courts to inquire, after the title has passed from the government and the question became one of private right, whether according to the established rules of equity and the act of congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another.

In the case at bar there was an absolute want of power in the land officers to issue a patent to the defendant in error, because the title of the United States had passed out of the government and vested in the plaintiff in error. In such a case the action of the land officers may be reviewed in an action at law.

In *Sherman vs. Buick*, *93 Otto*, *209*, the question arose in an action at law, between a patentee of the United States who claimed to have settled on the

land in controversy prior to the surveys, and the patentee of the state of California claiming under the act of Congress granting to the state sections 16 and 36 for school purposes and allowing the state to select indemnity lands where the granted sections had been settled upon prior to the survey, the court held the title under the state void, and said:

"It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, although where it was merely voidable, the party may be compelled to resort to a court of equity to have it so declared."

IV.

But this is a contest between an earlier and a later legal title, in which the prior title must prevail.

The lands in controversy were within the place limits of the grant to the plaintiff in error. The grant was in the ordinary language of congressional land grants, to-wit: "That there be and is hereby granted." This grant was a grant *in præsenti*.

In *Ryan vs. Railroad Company*, 99 *U. S.* 382, this court held under a precisely similar statute:

"When the road was located and the maps were made, the right of the company to the odd sections first named, (viz., the granted or place lands,) became *ipso facto*, fixed and absolute. In cases arising under these laws, the patents or certified lists have always been held, not as constituting the title, but as merely evidence of it."

In *Wright vs. Rosebury, 121 U. S. 488 and 521*, the court below held that—

"Because the commissioner of the general land office had not certified the lands in controversy to the state, there was no title in the state which could be enforced, thus making the investiture of title depend upon the act of the commissioner instead of the act of congress; whereas the certificate of that officer, when the previous requirements of law have been complied with, is only an official recognition that the lands are of the character designated and of the completeness of their segregation." "The decision," adds the court, "is in conflict with its previous decisions and with the adjudged cases to which our attention has been called."

And for the error in holding that the certificate of the commissioner was necessary to pass the title of the demanded premises to the state, the judgment of the court below was reversed and the case sent back for a new trial.

While the original land grant to the plaintiff in error (*page 169, Lester's Land Laws*) provided for patents, a subsequent act, approved July 13, 1866, entitled "An act relating to lands granted to the state of Minnesota to aid in constructing railroads (*2 Lester's Land Laws, 175,*) provided that—

"All the lands heretofore granted in the territory and state of Minnesota to aid in the construction of railroads shall be certified to said state by the secretary of the interior from time to time, whenever any of said road shall be definitely located, and shall be disposed of by the state in the same manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act."

And since the passage of this act it has been the uniform practice in the departments to issue no patents for railroad grants in the state of Minnesota, but,

upon the location of the road, to certify the lands to the state, pursuant to the last mentioned act.

In *Schulenberg vs. Harriman, 21 Wal. pp. 44-60*, this court held that a similar act of congress to the one in question here, passed a present interest in the lands designated, and said:

"There could be no doubt that the language used imports a present grant, and admits of no other meaning. The language of the first section is, 'that there be and is hereby granted to the state of Wisconsin the lands specified.' The power of disposal and the provisions for the lands reverting, both imply what the first section in terms declares, that a grant is made; that is, that a title is transferred to the state."

V.

The lands in controversy were not appropriated, reserved or set apart by any competent authority, nor had the right of homestead settlement attached to the lands at the time of the location of the road of the plaintiff in error.

An attempt has been made to apply the principles to this case first announced in *Wilcox vs. Jackson, 13 Pet. 498*, and which assumed definite shape in *Wolcott vs. Des Moines Co., 5 Wal. 681*, and the cases following it, arising out of a grant for the improvement of the navigation of Des Moines river. The principle was never better formulated than by this court in *Wilcox vs. Jackson*, viz.:

"That whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from

the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace it, although no reservation were made of it."

The *Des Moines* case, the case of *Leavenworth, Lawrence & Galveston R. R. Co. vs. U. S.*, *2 Otto*, *733*, *Newhall vs. Sanger*, *2 Otto*, *761*, and other similar cases have established the doctrine in this court, that where land is withdrawn *by competent authority*, pending the determination of a litigated right, or legally appropriated for any purpose, it is to be construed as withdrawn from the mass of public lands. If that state of facts exists, at the date of the location of a line of railroad under a subsequent congressional grant of lands for its benefit, the lands will not pass by the grant; and if afterwards, it should be determined that the title set up against the United States was void, the lands would fall into the mass of public lands, and would not pass under the subsequent grant to the railroad company.

These cases can have no application to the case at bar, because the very gist and kernel of the controversy is the fact that, without settlement and improvement, the register and receiver had no jurisdiction and no authority to appropriate the lands to any purpose, to segregate them from the public mass, or to permit a homestead entry upon them.

In the earlier decisions of the land department, before this principle came to be settled and understood, the holdings were, that where a homestead entry existed at the time of the location of a railroad under a subsequent grant, whether valid or void, if afterwards abandoned or cancelled, the lands passed under the railroad grant. After these decisions, the holdings of the department, with perhaps some diversity, were that

if the homestead or pre-emption entry was a valid one and existed at the time of the definite location of the railroad, but was afterwards abandoned, the lands passed to the United States and not under the grant; but if the homestead or pre-emption entry was void, they passed under the grant to the railroad company.

The supreme court of the state in its decision, referred to the case of *Kansas & Pacific R. R. Co. vs. Dunmeyer, 113 U. S. 629*, and say, that it appears to take, or to tend toward, the same view of the effect of the land grant acts upon homestead and pre-emption entries, taken by the land department in the case at bar, and that that is the understanding of the department itself as to the Dunmeyer case.

In saying this, the court utterly loses sight of the crucial distinction. The Dunmeyer case was the case of a *valid* homestead entry; it was made under the original homestead law. *Sections 2289, 2290 of the Revised Statutes of the United States*, which did not require any preliminary settlement or cultivation, but simply that the entry should be made for the purpose of actual settlement and cultivation; whereas section 2293, under which the present controversy arises, only gives the right to a person whose family or some member thereof is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement has been made. In that case, at the time of the definite location of the road, a valid homestead existed, and the party was in possession; subsequent to the location he abandoned his homestead entry and took title under the railroad company. The defendant then entered the land under the homestead law, claiming that by such abandonment it had passed into the mass of public lands and

not by the grant to the railroad company. The court said, (page 634):

"The record shows that Miller made a homestead entry on this land, *which was in every respect valid*, in July, 1866; it shows that the line of definite location of the railroad was filed September 21, 1866. The entry of Miller, therefore, brought the land within the language of the exception in the grant, as land to which a homestead grant has attached at the time that the line of the road was definitely fixed."

The comments of the court, which the court below, as well as the land department, seem to have misunderstood, were as follows:

"In the language of the act of Congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the the land, but it meant a proceeding in the proper land office by which the mere right to the land was initiated; it meant that by such a proceeding the right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions, the company had nothing to do; the right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

This language was entirely applicable to section 2290 of the original homestead law, under which, as the court said, "a right of homestead could ripen into a perfect title by future residence and cultivation."

When the party had filed his application under that section, he had done all that the law required of him. A valid homestead entry existed. But in the case at bar, under section 2293, it was not a future residence

and cultivation that was required, but a present residence and a prior improvement.

The distinction between a valid and a void homestead entry is as well marked by this case, when compared with the principles settled in this court by the cases to which I have referred, as it could possibly be by any case, however strongly and affirmatively asserting the soundness of our position.

VI.

The construction of the land department, is, under the circumstances, entirely immaterial in this case.

But the court below rested its decision entirely upon what it calls "the uniform construction of the land department." No such construction was pleaded or proved. Whether it is competent for the state courts to take judicial cognizance of the decisions of the land department, is a question which I submit, although I do not stop to argue it; but taking the list of decisions which the court cites, and it shows that the beginning of the settled construction upon which the court so much relies, was in the two cases reported in *9 Copp's Land Owner*, one of which is the case at bar. It is true that it cites three decisions published in *2 Copp's Public Land Laws*, in support of the alleged construction of the department; but that construction, which is made patent by the citations of the court, was by no means a settled and uniform one. For in *Knisken vs. Hastings & Dak. R. R. Co.*, *2 Copp's Public Land Laws, 858*, and *Larson vs. St. Paul & Pacific Railroad Co.*, *2 Copp's Public Land Laws, 62*, as well as earlier cases, the decisions were

in favor of our contention here; but the court says, "they must be treated as overruled by the later holdings." In saying this, the court, as it seems to me, misconceives the reason why a uniform construction by the land department is allowed to have weight in the decisions of the court.

The case of *Graham vs. Hastings & Dak. R. R. Co.*, decided in *9 Copp's Land Owner, 236*, which is this very case, did decide that a homestead entry, whether valid or void, withdrew the land from the operations of a grant to the railroad, and it was for the express purpose of bringing what we conceive to be a new departure in the decisions of the land department in this case under the revision of the court that this action was brought. But we had no power to enjoin the land officers, and, in the meantime, having established this rule, they have gone on and followed it in numerous cases; but that a line of decisions made by the land department, while the correctness of the principles adopted by it is pending decision in the courts, can be invoked to prop up and sustain the original erroneous decision, is a novel application of the doctrine of the conclusiveness of land office construction. If such decisions can be invoked, the land office is practically beyond the control, and their decisions can never be examined or reversed, by this court. It reverses the natural order of things, and subordinates the decisions of this court, supreme, as its name imports, in all matters of judicial action, to the capricious rule of one of the subordinate political and executive branches of government.

But a contemporaneous construction by the officers, upon whom is imposed the duty of executing land laws, must have been settled and uniform at and prior to

the time when the controversy which they are sought to conclude arose; and then they can only influence the courts in cases of grave doubt or ambiguity. Judge Cooley says: "when no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law. Cotemporary construction can never abrogate the text."

Cooley on Constitutional Limitations, 69.

The supreme court has, in repeated instances, in the administration of the land laws, made decisions which have overruled the practice and decision of the land department which had existed and been settled for years. Prior to the case of *Ryan vs. Railroad Co., 99 U. S., 382*, a settled practice and construction by the secretary of the interior, and commissioner of the general land office, and the authorities of states to whom railroad grants had been made, was that upon the passage of a grant *in præsenti*, both lands in place, and indemnity lands, vested indiscriminately in the state; so that upon the subsequent location of the road, or selection of the lands, the title related back to the date of the act. In that case, the court, for the first time, held, disregarding this settled construction, that, as to indemnity lands, no title passed until the selection. And in the subsequent case of *Sioux City R. R. Co., vs. Chicago Ry., 117 U. S. 406*, the court met the objection that many similar grants in Kansas, Iowa and Minnesota had been adjusted upon the theory that there was no difference between place lands and lieu lands in this regard, and that the action of the secretary of the interior and of the governor, had been based upon that settled construction by saying:

"We think the action of the secretary of the interior and of the governor of Iowa under this mistake of law and of their powers, and especially the governor of Iowa, the common trustee of both these companies, cannot have the effect of destroying the rights of the parties."

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VII.

Section 2308 of the Revised Statutes of the United States, Irrelevant.

The court below seeks to sustain its position by reference to section 2308 of the Revised Statutes of the United States, passed the 8th day of June, 1872, and says, "it evidently rests upon the propriety of the construction of a law like that given by the land department."

I do not exactly understand what the court means by this. The section seems to be intended to relieve the person, who is actually enlisted in the army at the time of his entry under the homestead law, from the necessity of a residence while in the military or naval service; but it does not purport, nor does it contain any language which can be construed to affect the requirement of section 2293, of a residence and improvement by some member of his family, prior to his application. It seems to be intended to relieve the party from the requirements of section 2291, regarding a continuous residence for five years after the date of his entry. But had section 2308, which was passed many years after the right of the plaintiff in error had attached to this land, specifically attempted to relieve

the settler from the requirement of residence and improvement by some member of his family at the time of the entry, it could not affect the vested rights of the plaintiff. The United States, in 1872, might have, as against itself, waived any requirements or conditions precedent to an alienation of the public domain which it saw fit; but it could not by such waiver affect the rights of the plaintiff which had become fixed and vested five years before the passage of the law of 1872.

GORDON E. COLE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 49. OCTOBER TERM, 1889.

HASTINGS & DAKOTA R. R. CO.,
Plaintiff in Error,

vs.

JULIA D. WHITNEY & JOHN WHITNEY,
Defendants in Error.

It is hereby stipulated and agreed that the record in the above entitled cause in the Supreme Court of the United States may be and hereby is amended by inserting therein after the word "family" in the 10th line from the bottom on page four (4) of said record the words following, to-wit: "was then residing on or ever did reside on said land and no improvement had ever been made on said land by the affiant or any member of his family."

Dated Oct. 23, 1889.

GORDON E. COLE,
Attorney for Plaintiff in Error.

M. O. LITTLE,
Attorney for Defendants in Error.